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# INDIAN ASSOCIATION OF ALBERTA

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COMMENTS ON THE REVISION OF  
THE CONSTITUTION OF CANADA

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COMMENTS ON THE REVISION OF  
THE CONSTITUTION OF CANADA

INTRODUCTION

"Both central and provincial authorities should pursue direct discussions with representatives of Canadian Indians, Inuit and Metis, with a view to arriving at mutually acceptable constitutional provisions that would secure the rightful place of native peoples in Canadian society."

With these words the Task Force on Canadian Unity clearly states the need for native groups in Canada to have a major input into the constitutional revision process. The Indian Association of Alberta as the representative of the Treaty Indians of the province is in full agreement with this concept and is prepared to develop a coordinated and comprehensive presentation of the views of Alberta Indians on constitutional revisions.

INDIAN RIGHTS

As original owners of the land upon which the Dominion of Canada was founded, Indian peoples have a greater and more significant interest in changes to the Canadian governmental framework than the "two founding nations".

In his report of March, 1977, Dr. Lloyd Barber, the Commissioner on Indian Claims says:

"Native people in Canada resided here for a substantial period before European contact. All of us who have come subsequently did so of our own free will, knowing the government and rules under which we would live. This is not the case with Native people. They were here and we imposed ourselves upon them."

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With the arrival of the European, the colonial powers gradually assumed political control over Indian lands and the Indian people they came into contact with. Constitutional and legal doctrines developed by the colonial legal system have denied the existence of Indian rights. The Indian peoples who owned and occupied their lands were according to the Judicial Committee of the British Privy Council declared:

"So low on the scale of social organization that their useages and conceptions are not to be reconciled with the institutions or the legal ideas of civilized society."

It served colonial purposes for the Indian to be considered less human and having less rights than the European. The Sumpreme Court of Canada has recognized that the law of aboriginal rights developed as part of a tradition based on:

"Ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species."

#### THE SPIRIT AND TERMS OF TREATIES

Our Elders and Treaty and Aboriginal Rights research efforts have established that the spirit and terms of the treaties Indian peoples signed was to share the land with the Europeans. In return, Indian peoples were to receive protection for the use of their lands, as well as provision of such services as would enable our survival on smaller territories and alongside European settlers. Indian peoples signed the treaties in good faith. We trusted the word of the "Great White Father" given to us by his negotiators. We believed we could share the use of our lands. We agreed to live in certain territories which would be forever protected for our exclusive use by the treaties. We trusted the Commissioners when they promised we could continue to use the lands assigned to the Crown for our traditional economic purposes.





We did not sell the land because land is not a commodity. It is the view of the Indian Association of Alberta that the spirit and terms of the treaty have not been carried out. The time has come to negotiate with the Government of Canada to determine how Indian peoples will benefit from our heritage to share in the wealth of our country. The Indian Association of Alberta takes the position that reference to the spirit and terms of the treaties is an essential element of a new Constitution.

### INDIAN GOVERNMENT

The responsibility of the Crown to protect our people, their rights and territories was recognized by the British North American Act which set the framework within which colonials gained self-government in our country. Colonial legislation before and after Confederation have recognized the special status of Indian people within the Canadian governmental framework, but the belief that the Indian was inferior to the European prevailed and a process of directed civilization began based on the premise that Indians could not manage their own affairs. In the treaties, Indian peoples promised to respect and be loyal to the Crown, but we did not give up our rights as Indian peoples to govern ourselves. Today it is no longer necessary for Indians to give up their Indian rights and status to exercise the vote. The granting of voting rights, extending full citizenship to Indians marked a change in Federal policy—Indians could be Indians, and citizens too. In principle, if Indians were deemed responsible enough to vote, then they must be responsible enough to conduct and manage their own affairs but this is not the case. Indian peoples today continue to have their affairs managed and governed according to the principles of colonial rule. This form of Federal-Indian relationship is no longer tolerable to Indian peoples. The reality of Indian Government as a constituent element of Canadian Federalism needs to be clearly established in a new Canadian Constitution. The Indian Association of Alberta believes that Indian Governments should have legislative, executive, judicial, and administrative jurisdiction over Indian people and Indian lands both on and off the Reserve.





## GENERAL PROVISION

We share with Dr. Barber and with the Task Force on Candian Unity, the belief that specific constitutional provisions must be made to recognize the special position of Indian peoples in Canada. The Task Force said:

- "28. The preamble to the constitution should include a declaration that the people of Canada. . ."
- iii. affirm the special place of the native people of Canada."

The Indian Association of Alberta agrees with this recommendation. It is our belief that an appropriate statement might be along the lines of the following:

"It is recognized that as Canada's original inhabitants, the Indian and Inuit people enjoy a unique position in society. As the possessors of the Indian title to this land, they have been and are entitled to just and equitable compensation for lands and other resources. The Treaties and other agreements by which surrender was or is achieved are and shall be part of this Constitution as shown in Schedule 6."

## FEDERAL JURISDICTION

While a general statement of principle in the preamble is essential, more specific provisions are necessary in the Constitution if the principle is to have meaningful application.

There has been much controversy over the years as to the nature and extent of the jurisdiction conferred by Section 91(24). Many aspects of that controversy remain unresolved. The Indian Association of Alberta believes that it is necessary in any new Contitution to retain in clear and unequivocal terms the jurisdiction of the Parliament of Canada over Indians and lands reserved for Indians as contemplated in the present Act, Section 91(24). It may be necessary to expand the

We share with Dr. Gordon and with the Task Force on Canadian Unity, the belief that specific constitutional provisions must be made to recognize the special position of Indian peoples in Canada. The Task Force said:

"13. The grounds for the constitution should include

14. ... the special place of the native people of Canada."

The Indian Association of Alberta agrees with this recommendation. It is our belief that an appropriate statement might be along the lines of the following:

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FEDERAL JURISDICTION

While a general statement of principle in the preamble is essential, more specific provisions are necessary in the Constitution if the principle is to have meaningful application.

There has been much controversy over the years as to the nature and extent of the jurisdiction conferred by Section 91(2A). Many aspects of that controversy remain unresolved. The Indian Association of Alberta believes that it is necessary in any new Constitution to retain in clear and unequivocal terms the jurisdiction of the Parliament of Canada over Indians and lands reserved for Indians as contemplated in the present Act, Section 91(2A). It may be necessary to expand the



with precise definitions to eliminate the confusion which now surrounds the application of this section, alternatively to restrict the present unlimited and plenary powers over Indians and lands reserved for Indians in areas of Indian Government jurisdiction. During the process of consultation and development of a comprehensive position, the details of proposed federal jurisdiction will need to be worked out.

### BILL OF RIGHTS

The Bill of Rights was designed and established to protect the integral rights of all Canadians. It has been used to deny the fundamental rights and very survival as a distinct entity of Canada's "First Citizens". In addition to the constitutional guarantees and assurances of Indian rights, it is the position of the Indian Association that the Bill of Rights should be suitably amended to ensure that it does not impair, abridge or abrogate Indian rights.

### STATUS OF TREATIES

It may very well be the case that in areas of Canada where no Treaties or agreements have been made, that aboriginal claims will need to be negotiated and settlements made. Such new settlements will require constitutional recognition. In addition many of the existing Treaties may be revised and updated. These revisions will also require recognition.

### NATURE OF TREATY COMPENSATIONS

A recurring area of difficulty has to do with the meaning of the compensations provided in the Treaties. Many people regard their compensations as an alternative to the normal public services provided to other citizens. A new constitution must recognize that the receiving of these services, rights and exemptions is compensation for land and is in addition to, not in lieu of the rights and services to which Indian people are entitled as Canadians, and Albertans.





## TREATY COMPLIANCE

Acceptance of the need to comply with the spirit and terms of the Treaties is not in itself enough. Provision must also be made for a resolution of allegations of non-compliance as well as disputes as to what constitutes valid compliance. Basically, there are no choices available as mechanisms for resolving this type of dispute.

The first approach is to employ either the regular court system or a specially created tribunal. In this type of setting an adversary approach is used. The main objections to this approach are that it is very costly and time consuming, and more importantly that it creates a backlog of hostility and bad feelings. In any case it can always be resorted to if more desirable methods have failed. The courts are ill equipped to handle this type of difficulty.

The second and most appropriate approach is to negotiate modern day interpretations. Clearly this is by the far the preferable route to go. Certainly, the equity of the interpretations themselves and the ensuring good will are well worth the efforts of negotiating. The negotiated interpretations is the outcome of being sought by the Indian Association of Alberta.

The establishment of a body responsible for arranging for funding of research, consultation, and negotiation is essential. Such a body should operate on a long term basis until such time as all claims are resolved. It should be able to be reestablished from time to time, as necessary.

## RELATIONSHIP OF PROVINCIAL JURISDICTION TO INDIANS AND RESERVES

While reiterating or even expanding the federal jurisdiction created by Section 91(24) of the present constitution is a necessary step, the possibility for confusion may remain. At the present time, for example, many have suggested that provincial powers enumerated in Section 92 apply to Indians and apply on reserves. This is achieved currently by the operation of Section 88 of the Indian Act which states:





"88. Subject to the terms of any Treaty and any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under the Act."

Legal research is required to determine the constitutional standing of this section. Could a Band Council by-law under this section withstand contrary provincial legislation (assuming the by-law had been properly passed and duly approved by the Minister)? The question then is, does the present federal power created by Section 91(24) empower Parliament to give the type of paramountcy contemplated by Section 88 of the Indian Act. The Indian Association of Alberta believes that it does.

Amendments to the constitution will be required to clarify the questions of Indian Government Jurisdiction and of Indian Government consent for the application of provincial law to Indians and Indian lands.

#### PROVISION FOR ADMINISTRATION OF THE LAWS OF CANADA ON RESERVES

The Indian Association of Alberta believes that this is room for greater effectiveness and greater efficiency in the administration of justice on reserves. It may be that the wording of the present Section 101 of the British North America Act provides a mandate for Parliament to establish a reserve court system. If research should determine that this is not the case, or if more clarity is required, changes may be needed in any revised constitution to clarify this issue.

#### PROVISION FOR AN INDIAN CIVIL CODE

While there is great merit in having the criminal law system uniform both in content and in application throughout the country, there is equal merit in having a diversified civil law system. Such a system can be designed to recognize in a positive way, difference in values, culture and language of various minorities. We already have such a system in operation in Canada. Currently, the Province of Quebec has





its own civil law system. The importance of the need for this was recognized at the time of the conquest when the British colonial authorities recognized the rights of French Canadians to their language and their civil laws. There is no reason why Indian people resident on reserves, whose language, culture and values are equally distinctive should not also have their own civil laws.

#### LEGISLATIVE REPRESENTATION

Many countries recognize the special need for representation of their native people in the legislature. New Zealand, for example, provides for four Maori seats. The Indian Association of Alberta believes that Indian people should have legislative representation at the federal level.

#### CONSTITUTIONAL AMENDMENTS

The single most contentious issue in the history of attempts to patriate the Canadian constitution has been the amending procedure particularly as it applies to the distribution of powers. There has been a fairly consistent feeling however that regions and language groups should have special protection. Inasmuch as Indian people possess certain basic rights, it is felt that special protection should be given to the clauses in the constitution which enumerate those rights.

#### NATURAL RESOURCES

Due to the fact that the Treaties and other agreements have provided for Indian people to have control over the resources on lands reserved for them, it is necessary to provide an unequivocal constitutional guarantee of this control.

#### LAND ALLOCATIONS

There are numerous situations in which the federal government has by Treaty agreed to provide allocations of land for reserve purposes. All too often the federal and provincial governments cannot reach agreement upon the provision of provincial Crown land to meet these obligations. Constitutional arrangements must be made to correct this difficulty.





## DEVELOPMENT OF A SET OF CONSTITUTIONAL PROPOSALS

This paper is a brief outline of some of the thoughts of the Indian Association of Alberta on the subject of constitutional amendment. It is necessary to provide time and resources for Indian people to complete the amount of research and consultation necessary to develop a complete position on constitutional questions affecting their interests. Unlike provinces and many other large organizations, the Indian people of Alberta do not have a large staff equipped to research constitutional issues or to consult with the communities on these questions on short notice.

In its response to our Red Paper, the federal government said, ". . .we're in no hurry if you're not. You know, a hundred years has been a long time and if you don't want to answer in another year, we'll take two, three, five or ten, twenty—all the time you people need to come to grips with this problem. And we won't force any solution on you, because we are not looking for any particular solution. . ."

In practical terms it will take a considerable period of time to conduct thorough but not excessively long community consultation processes, necessary research and final drafting of comprehensive recommendations. The Association does not presently have the necessary resources.

In any case, vigorous research and effective consultation must be in the very near future if Canada's first citizens are to have a meaningful input into the process of constitutional revision.



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